Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

Beryl Broyde; Mirel Broyde; David Cohen; Judith Cohen; Milton Duchan; Marion Duchan; Phillip D. Haack; Diane Hochberg; Helen Kuperman; Jerry T. Novetsky; Elliot Schoenig; Sarah Schoenig; Sharon K. Teasley; Robert L. Tilden; Samuel Tron and Doris Tron,

Petitioners

v.

Gotham Tower, Inc.; Bell Broadcasting Company; Marlin Broadcasting Company and Viacom International, Inc.,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SIXTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DONNELLY W. HADDEN, P.C.
By: Donnelly W. Hadden
Attorney for Petitioners
301 E. Liberty St., Suite 585
Ann Arbor, MI 48104
(313) 741-5050

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3. Memorandum Opinion and Order of the United States District Court.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BERYL BROYDE, MIREL BROYDE, DAVID COHEN, JUDITH COHEN, NATHAN COHEN, MILTON DUCHAN, MARION DUCHAN, PHILIP HAACK, DIANE HOCHBERG, ICEK KUPERMAN, HELEN KUPERMAN, JERRY NOVETSKY, ELLIOT SHOENIG, SARAH SHOENIG, SHARON TEASLEY, ROBERT TILDEN, SAMUEL TRON and DORIS TRON

Plaintiffs,

vs. CASE NO. 92-CV-74276-DT
HON. LAWRENCE P. ZATKOFF

GOTHAM TOWER, INC., a Michigan corporation, BELL BROADCASTING COMPANY, a Michigan Corporation, HOKER BROADCASTING COMPANY, a defunct Michigan corporation, MARLIN BROADCASTING COMPANY, a Delaware corporation, and VIACOM INTERNATIONAL, INC., a Delaware corporation, jointly and severally.

Defendants.
_____/

MEMORANDUM OPINION AND ORDER

AT A SESSION of said Court, held in the United States Courthouse, in the City of

Detroit, State of Michigan, on the 21st day of October, 1992

PRESENT: THE HONORABLE LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

This matter is before the Court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). Plaintiffs have since responded.[1] Accordingly, it is hereby ORDERED that defendants' motion will be resolved without oral hearing. E.D. Mich. LR 7.1(e)(2). For the reasons that follow, defendants' motion is GRANTED.

FACTS

Defendant Gotham Tower, Inc. is a Michigan corporation which controls and operates an 800 foor radio tower at 24600 Greenfield Road, Oak Park, Michigan. The tower serves as a transmitting antenna for four FM radio stations. Those stations are

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[1] Plaintiffs have also filed a motion for remand. In light of this opinion, however, that motion is MOOT.

owned by the other named defendants, Bell Broadcasting Company, Hoker Broadcasting Company, Marlin Broadcasting Company and Viacom International, Inc.

Plaintiffs are individuals who reside in Oak Park. They contend that the transmission of radio signals by the stations utilizing Gotham Tower "cause radio frequency radiation to cross over plaintiffs' property at high levels of intensity which regularly exceed the federal standard for F. M. blanketing interference. . . ." Plaintiffs' Complaint, p. 3. According to plaintiffs, this results in "serious and continuous interference with radio and television reception at [their] homes, and serious and continuous interference with . . . other home electronic equipment such as telephones, garage door openers, recording devices, stereos, and VCR's [sic]. Id.

Plaintiffs' thus brought suit in Oakland County Circuit Court seeking injunctive relief and damages. Their claim is predicated on common law nuisance.

On July 27, 1992, defendants filed notice of removal to this Court. They maintain that the nuisance claim is preempted by the Federal Communications Act of 1934 ("FCA"), 47 U.S.C. §§ 151-613. Consequently, since this Court would have original jurisdiction under 28 U.S.C. § 1331, the case was properly removed pursuant to 28 U.S.C. § 1441. Defendant now moves to dismiss on the grounds that plaintiffs' complaint does not state a claim upon which relief can be granted.

STANDARD OF REVIEW

A Fed. R. Civ. P. 12(b)(6) motion requires courts to determine whether legally cognizable claims have been plead. All factual allegations in the complaint

must be accepted as true, and the motion must be denied unless it appears beyond doubt that the non-movant can prove no set of facts which would permit relief. Windsor v. The Tennessean, 719 F.2d 155, 158 (6th Cir. 1983), cert. denied, 469 U.S. 826 (1984).

OPINION

The issue before this Court is a narrow one: Whether the FCA preempts plaintiffs' state law nuisance claims? If so, plaintiffs' complaint must be dismissed.

Several courts, both state and federal, have addressed this question. All have reached the same result. Perhaps the most persuasive is Blackburn v. Doubleday Broadcasting Co., 353 N.W.2d 550 (Minn. 1984). In Blackburn, the plaintiffs were individuals who lived or worked in the Minneapolis, Minnesota area. They claimed

that several radio stations which broadcasted atop a particular tower interfered with or distorted their reception of other radio stations. The plaintiffs claimed that the distortion constituted an actionable nuisance under Minnesota law. The Minnesota Supreme Court disagreed. In reaching its decision, the court noted that the FCA constitutes "a plenary exercise of the federal government's power to occupy and regulate the broadcast industry." Id. at 551. Pursuant to the Act, Congress delegated comprehensive powers to the Federal Communications Commission ("FCA") to administer a unified and comprehensive regulatory scheme for the industry. Id. at 551-52 (citing Federal Communication Comm'n v. Pottsville Broadcasting Co., 309 u.s. 134, 137 (1940)). In carrying out its duties, the FCC is authorized to "[m]ake

such regulations not inconsistent with law as it may deem necessary to prevent interference between stations. . . ." 47 U.S.C. § 303(f). The court then considered whether enforcement of a nuisance claim with respect to interference would be inconsistent with the delegation of authority to the FCC.

In holding that it would, the court stated that "[t]o resolve [a nuisance] claim, the state court would be required to determine just what level of interference, if any, is inappropriate. . . . That, however, is precisely the subject matter which lies within the exclusive regulatory jurisdiction of the FCC. It is quite apparent, therefore, that the state court may reach results which conflict with the regulations imposed . . . by the FCC." Id. at 555-56. This, the court noted, is irreconcilable with Congress' expressed

intent that the FCC should exercise exclusive jurisdiction over regulating this subject matter. Id. at 556. Given this clash, the court ruled that the plaintiffs' nuisance claims were preempted. Accord Still v. Michaels, 166 Ariz. 403, 404 (1991) (affirming the dismissal of plaintiffs' nuisance action on the basis that the FCC has exclusive jurisdiction over matters concerning interference); Smith v. Calvary Educ. Broadcasting Network, 783 S.W.2d 533, 537 (Mo. CT. App. 1990) (affirming trial court's dismissal of plaintiffs' nuisance claim for interference with property owners' use of electrical and electronic appliances because of FCA preemption).

This Court agrees with the rationale of Blackburn. Accordingly, plaintiffs' nuisance claims are preempted, and the complaint fails to state a claim upon which

relief can be granted.

CONCLUSION

For the reasons set forth above, defendants' motion is GRANTED. Plaintiffs' complaint is hereby DISMISSED.

IT IS SO ORDERED.

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DISTRICT

BERYL BROYDE, et al.,

Plaintiffs,

vs. CASE NO. 92-CV-74276-DT
HON. LAWRENCE P. ZATKOFF

GOTHAM TOWER, INC.,
a Michigan corporation, et al.,

Defendants.
_____/

J U D G M E N T

IT IS ORDERED AND ADJUDGED that this action is hereby DISMISSED pursuant to the Memorandum Opinion and Order dated October 21, 1992.

Dated at Detroit, Michigan, this 21st day of October 1992.

JOHN P. MAYER
CLERK OF COURT

/s/_____

APPROVED:

/s/_____
LAWRENCE P. ZATKOFF
UNITED STATES DISTRICT JUDGE